PROCEEDINGS OF THE CONFERENCE ON LEGAL AND SOCIAL PHILOSOPHY.

The institution of the conference was suggested by the action of the Association of American Law Schools in officially recognizing the need of a conscious philosophy of law and by the preface which its Committee drew up to the Modern Continental Legal Philosophy Series. An inquiry by Professors Cohen, Overstreet, and Pitkin showed considerable interest in the subject among teachers of philosophy as well as teachers of law, and a first meeting, under the chairmanship of Professor Dewey, was called to discuss the Relation of Law to Social Ends. The formal meetings for the reading and discussion of papers took place on Friday afternoon, April 25, 1913, at the College of the City of New York, and on Saturday morning and afternoon, April 26, at Columbia University. On Friday evening, after an informal meeting on methods of coöperation between teachers of philosophy and teachers of law, on motion of Professor Felix Adler, a committee was appointed to report on a plan of a permanent organization. The committee, consisting of the chairman, the secretary, and Professors Creighton, Kirchwey, Lewis, Pound, and Tufts, recommended at the beginning of the session of Saturday afternoon that those present organize themselves into a permanent conference on Legal and Social Philosophy and that the next meeting take place November 28-29 to discuss the problem of Administrative Justice. The report was accepted, and the temporary officers and committee were constituted into an Executive Committee of the conference. The place of meeting was left to the Executive Committee, who subsequently accepted the invitation of Chicago University. The expenses of the first meeting were met by voluntary contributions.

M. R. COHEN,
Secretary.

Abstracts of the papers read follow:

THE PHILOSOPHY OF LAW IN AMERICA. Roscoe Pound.

1. *How did there come to be so complete a separation of jurisprudence and philosophy in Anglo-American juristic thought?*

To some extent such a separation took place everywhere in the nineteenth century. We simply carried it to an extreme. There were three causes that operated generally: (1) The need of special development of jurisprudence as a separate science; (2) reaction from abuses of the philosophical method which grew up while it held the whole ground; (3) the need of stability and certainty in the stage of maturity of law and consequent call for analytical rather than philosophical method.

Other reasons for the attitude of the Anglo-American lawyer toward the philosophy of law are peculiar to our legal system. One of these is a tradition averse to system, averse to legal science and averse to legal philosophy. At least from the time of Coke, want of system has been a point of pride. Another cause is to be seen in the dominance of the practitioner in Anglo-American legal education. Our law did not come from the universities, but from Westminster Hall. Again, account must be taken of the mode of growth in Anglo-American law as compared with Continental Europe. The one has grown through judicial empiricism, the other through juristic science. A philosophical tradition was handed down by the Roman books; a wholly practical tradition by the English precedents. Finally, American law is a product of the nineteenth century, a period of stability which required and relied on analysis rather than philosophy.

2. *The present situation with respect to philosophy of law in America.* The absolutistic ideas which have prevailed so largely in American legal thinking came from Grotius in two ways; on the one hand through Blackstone, on the other hand through American publicists of the eighteenth and first part of the nineteenth century who followed the Dutch and French publicists and civilians. The historical school and the metaphysical type of the philosophical school which prevailed in the nineteenth century were closely akin. One sought to discover an ideal law through history, the other sought to find it through logical development of an abstract idea. These views were reconciled by saying that jurisprudence had two sides: the historical unfolding of the idea of liberty as men discovered the rules and principles by which to realize it, and the logical unfolding of the principles involved in the abstract conception. This doctrine was taught in one of our law schools as early as 1849 and was given currency by the writings of Sir Henry Maine. Its influence be-

came marked as American students began to go to Germany and German ideas took root in our universities. Later it was reinforced by the positivists. Many cases where judicial opinions show the effect of Spencer's writings might be cited. But the positivists got their data from the historical jurists and looked at them through the metaphysical spectacles of that school. All four of the nineteenth century schools came to Kant's position as to the end of law, though for different reasons and in different ways. American lawyers affected to ignore philosophy of law. But whenever they looked beyond their law books to current thinking on right and justice, they found that the traditional individualism of the common law was justified by science. Thus the ultra-individualism of professional thinking in America is due to the mutual action and reaction of an individualist legal tradition and an individualist legal science.

Five causes operated to give a peculiarly intense individualist color to American common law. (1) The English common law, the basis of our system, was made in the stage of strict law, of which individualism is a prime characteristic, whereas Continental Europe received, not the old *ius civile,* but the classical Roman law, which represents the stage of equity or natural law. (2) The common law preserved something of the individualism of Germanic law. (3) Puritanism gave that added emphasis to individualist ideas in the formative epoch of American legal thought that served to stamp them upon our law so thoroughly. (4) In the controversies between courts and crown in seventeenth century England political exigencies led the common law to take the position of guaranteeing individual interests against the state and against society. (5) The circumstances of frontier or pioneer or rural American communities of the first half of the nineteenth century reinforced the now well-settled individualism of our legal system.

Happily our Anglo-American practice is much better than our preaching. While our theories have been wholly individualistic, a complete change has been taking place beneath the surface in the actual course of judicial decision. If this advance has been irregular and halting, it must be said the community has by no means been settled in its ideas, and that economists, sociologists, students of politics, and philosophers have not been out of Egypt so very long themselves. The great change which has taken place in thought in the present generation has blinded

us to the progress which has been quietly going on in the law, and has brought into sharp relief the contrast between the orthodox legal creed and the newer conception of justice.

3. *The problems of philosophical jurisprudence in America.* Five problems may be noted: (1) the province of rule and of discretion in the administration of justice, (2) system of the law as a whole, (3) the theory of law making, both legislative and judicial, (4) the theory of the interests to be secured by the legal system and (5) application and enforcement of law.

In conclusion, the future of philosophical jurisprudence, or at least of philosophical method as one of the chief methods of jurisprudence, seems assured. The psychology of juristic thought, the psychology of judicial decision and the psychology of judicial law making are untrodden fields in Anglo-American legal science which will yield rich rewards to the pioneer. But before all, in the period of liberalization by infusion of ideas from without which is at hand, philosophical working out of social ends (so that they may be realized through rules and standards formulated by the judge and the legislator and developed by the jurist), is imperative. The law is ripe for such an infusion and it is actually in progress. It is largely for the philosopher and the philosophical jurist to give form and consistency to this process to the end that it be rapid and yet effective for its purpose.

THE ETHNOLOGICAL APPROACH TO LAW. A. A. Goldenweiser.

Writers on comparative jurisprudence like Post, Steinmetz, Westermarck, Hobhouse, Sutherland, and others, have not, so far, properly used the methodological principles of modern ethnology. Thus Kohler, for instance, has built up an entire system of law on the assumption of the former universality of maternal descent and its priority to paternal descent. With the fall of this doctrine, his legal system loses its foundations. Legal institutions or customs, like other cultural traits, can be properly evaluated only when studied in their cultural setting. Thus the marriage institution of the Kwakiutl cannot be understood if its relationship with the potlatch system be ignored; nor can the potlatch itself be understood if its objective manifestations alone are examined. The taboos and confessions of the Eskimo are reflections of the economic conditions among these people.

Australian data referring to regulated combats may serve as illustrations of the great variety of perfectly standardized social-protection devices that may exist in a relatively very primitive community.

A circumstance of importance for any theory of the evolution of law, is the fact that developed systems of legal procedure embracing witnesses, oath, the ordeal, occur in the Old World including Africa, whereas the American civilizations have produced no such systems.

A program of research in primitive law should include such topics as (1) The Standardization of Custom, involving the mechanism of standardization; its agents and agencies, and the problem of social pressure; (2) the Deviations from Custom, more particularly, who deviates? in what forms? what is the social reaction towards deviations from custom, and, more generally, what are the relations between the conservative and progressive elements in a primitive group? (3) The Formulation of Law: to what extent does it become the subject of conscious reflection? who does the formulating? what are the relations between formulated and unformulated law? (4) The Evolution of Law, including: the rise of legal institutions and official representatives of law; effect of the institutional character of law on the formulation of law; and the effect of the development of law as an institution on custom.

JHERING'S THEORY OF LAW. Isaac Husik.

An exposition of Jhering's *Zweck im Recht.*

THE RELATION BETWEEN LEGAL AND POLITICAL THEORY. W. W. Willoughby.

While not identical, legal and political theory are so nearly related and to so considerable a degree overlapping, that a separation of them is difficult. Political theory may be divided into the two departments of analytical and teleological political philosophy: the one seeking to determine the nature of political institutions by the legal characteristics exhibited by them; the other, aiming to define the institutions by the purposes for which they exist. Upon its analytical side, political theory thus constitutes a department of analytical jurisprudence. So, similarly, the aims of teleological political theory and of final jurisprudence are almost the same. In fact, the only important dis-

tinction between a system of ideal law and a political utopia is that in the latter there must necessarily be included, in addition to a statement of the general principles of right which should be recognized, an outline of a scheme of governmental organization through which these principles may be declared and enforced. In conclusion, emphasis was placed upon the value of political and legal theory in developing those fundamental principles which must be clearly apprehended if reforms in the law, whether substantive or procedural, are to be intelligently and beneficially applied.

RESPONSIBILITY. H. Rutgers Marshall.

(No abstract furnished.)

CRITERIA OF SOCIAL ENDS. James H. Tufts.

A legal conception which plays an important part in the consideration of how far organized society may properly further social ends is that of public purpose. The paper undertakes to examine certain judicial decisions and opinions with a view to discover how 'public purposes' are defined. Three distinct types of criteria for this conception are discovered, which appear to the lay mind impossible of consistent application to the various concrete cases in such a way as to account for the decisions reached. Some of the courts are apparently of the opinion that a consistent line of reasoning is followed; others reject absolutely certain of the criteria proposed. The three types are: (1) Deductive, (a) direct from a supposedly definite concept of the essential character of 'public' purpose, or (b) indirect, from the concept of what is essentially private, and hence not properly, public; (2) Historical, the term public being solely "a term of classification to denote the objects for which, according to settled usage the government is to provide," (3) Teleological, or experimental, public need and the appropriateness of public agency being the only test, and no definite concept possible.

The Massachusetts Supreme Court has by decision or opinion passed upon several proposals, approving (1) the compulsory lowering of a dam to relieve flooded meadows, (2) municipal water supply, (3) municipal gas and electric lighting, but disapproving as not properly public. (1) Aid to rebuild prop-

erty burned in the Boston fire of 1872, (2) municipal coal and fuel yards, (3) improvement of housing by purchase of land and construction of houses. It has relied chiefly on deductive arguments. The criteria employed were: (i) *Direct* aim versus resulting benefits. This, however, is rejected in another decision of this court, and in recent decisions of the U. S. Supreme Court. (ii) The number of persons affected. This, however, would be difficult to apply to the case of coal supply so as to justify disapproval. (iii) Affecting persons "as a community and not merely as individuals." But it is not clear that to keep houses from burning down affects the owners as a community, while to aid in rebuilding affects them solely as individuals, nor that the water we drink affects us as a community while the houses we live in affect us merely as individuals. The chief stress in the housing opinion is laid upon the indirect deductive argument that buying and selling land and houses is a 'natural right,' and hence the government must not compete. But it is well known that individuals have also engaged in selling water, gas, and electricity. The decisions and opinions may all be wise, but it is difficult to say that the reasoning by which they are supported is logical.

As for (2) usage, it may be said that it has probably played a more important part in the actual conclusions reached than is indicated by the attempts to find deductive grounds for them. No one would question its value if, taken in its proper limitations as indicating merely what has prevailed in the past, whether by royal prerogative, or public opinion, or sheer accident.

The teleological test (3. above) is increasingly employed by the U. S. Supreme Court. It is held to justify a conception of public purpose in one State which does not necessarily apply in States of different climate, or resources. This makes an interesting reversal of the logic of type (1), for instead of beginning with a fixed concept of what is public and deciding cases by deduction as to whether they do or do not fall under that concept, the method is to see whether the end proposed is desirable and can be reached exclusively or most appropriately by public agency. If so this is a strong reason for holding the purpose to be 'public.'

The Massachusetts Court in one case employs this line of reasoning also: "There is . . . a necessity of having water, common to the inhabitants of a community, which cannot well be

met except by the exercise of public right, and therefore the furnishing of water has been regarded a public service." If it had relied upon this in the housing opinion, it might or might not have reached the same result, but it would certainly be upon more tenable ground philosophically than in relying upon natural rights. It would also avoid the embarassment of using fixed concepts which cannot possibly be applied consistently to all its series of cases.

THE CONCEPTION OF SOCIAL WELFARE. Felix Adler.

The proposition is often put forth with some emphasis that all legislation should be directed toward securing the social welfare. But stated in this manner it is quite devoid of novelty. Legislation has always been directed toward what was believed to be the social welfare. The Brahminical authors of the code of Manu would have scouted the idea that the laws they framed, though bristling with privilege for the sacerdotal class, were not also conceived in the interest of Indian society as a whole. The Russian autocracy would press a similar claim. On the eve of the French revolution a singular plea was made to show that the interests of France required the integral preservation of the prevailing system. The progress that has been achieved consists not so much in relating legislation to social welfare, but in the conception of what social welfare consists in.

In this paper I shall attempt briefly to analyze the elements that enter into the notion of social welfare or the public good as at present held in the United States, and at the close I shall offer a suggestion as to the direction in which a higher ideal than that now prevailing may be looked for. Turning to our analysis, four components may be distinguished: 1. Individualism; 2. Modified Individualism (by which I understand the employment of collective action for the securing of individual ends); 3. Darwinism; 4. The Influence of Religion.

1. The principle factor in the prevalent conception of social good is individualism. To understand the sense which this word carries and the spell which it still exercises especially in the United States, we must remember that what is called individualism is a reaction against Feudalism. To suppose that Feudalism is a thing of the distant past implies a superficial reading of history. On the contrary, the modern world is still in the full

swing of reaction against Feudalism. America was peopled by persons who sought relief from the pressure of feudal institutions in Europe, and every year our population is swelled by thousands of immigrants who, actuated by this anti-feudal tendency, help to keep it alive and strengthen it in this country. Now the genius of Feudalism was expressed in the idea that a man may attain the fulfillment of his selfhood in another, the inferior in the superior, the vassal in the lord, the humble serf in the master. Vicarious achievement of greatness was the characteristic note in feudal loyalty. The servant in the house might speak of his master's splendor as if it were his own. In a certain sense it was his own. That which he could not arrive at in his own person he reached in the person of his Lord. Just as vicarious attainment of moral perfection was the key-note in religion, vicarious earthly achievement was the key-note in secular life.

Individualism is at bottom a protest against this view. Describing a circle around the individual, it affirms that every man shall fulfill the end of his being in that circle. This is the origin of the demand for liberty, equality, and the unhindered pursuit of happiness. Of course, the obvious fact that men are dependent on one another for the attainment of their purposes could not be denied. The individual is clearly under the necessity of making excursions beyond the self-circle in order to fulfill himself. But he does so in order to bring back, so to speak, the booty he captures outside, into his own lair. True to its fundamental notion strict individualism assesses all social activities in terms of the profit they yield for the agent. Strict individualism is consistently subjective. Pleasure is the common denominator by which it determines the value of all social acts.

Feudalism was based on wrong transitive relations, wrong because implying the indelible inferiority of the many to the few. Individualism is based on the denial of the objective validity of the transitive relations. They are treated as mere means to a subjective result.

2. Socialism in all its forms leaves intact the individualistic ends but resorts to collective action as a new method of attaining them. That Socialism is through and through individualistic in tendency, with emotional fraternalism superadded, is the point I would especially emphasize. It seeks to apply the fable

of "The Bundle of Sticks" for the benefit of each and all of the sticks.

3. Darwinism manifests its effects in two opposite directions: In encouraging a certain ruthless sort of selfishness by its doctrine of the survival of the fittest, leading even to short cut proposals to exterminate the unfit. On the other hand, mutual aid and coöperation as factors in evolution make their appeal to the more sympathetic natures, and the theory of evolution in general has encouraged a belief in the possible development of a higher human type.

4. The teachings of religion have supplied the material betterment movements of our day with a spiritual back-ground (we are to try to make men more comfortable, seeing that they are our brothers), but have not thus far provided a new and adequate definition of the spiritual end itself in the interest of which material improvement is to be operated.

In the United States at present we are passing out of the phase of strict individualism into the second phase of socialistic individualism. At the same time we are still maintaining the false principle that the individual can find the end of his being in the self-circle. We are still ignoring the objective transitive relation. We are still essentially hedonistic with a tinge of biblical ethicism added that strangely contrasts with our main conception of social wellbeing.

If, in closing, we look to the future and ask in what direction teachers, philosophers and seers (those who see ideals beyond the ones at the moment current) should endeavor to mold public opinion, my own answer would be in the direction of the concept of organicity. The problem of the future is to raise the transitive relations to the rank which belongs to them. Feudalism was right in affirming that a man must fulfill himself in the life of others. It was wrong in asserting that the few are superiors and the majority inferiors. The problem is so to interpret the social relations that men shall promote each others ends and shall find the common denominator no longer in pleasure but in the moral uplift experienced in enriching and thus revealing the organic life of the whole.

LAW AND PROGRESS. George W. Kirchwey.

(No abstract furnished.)

THE CONTENT OF SOCIAL JUSTICE. S. N. Patten.

Natural justice assumes the type of environment under which primitive nations lived and the motives that control men in antagonistic tribal societies. To bring it into relation to modern needs I shall put in parallel columns the basis on which two types of justice depend.

LEGAL PHILOSOPHY.	SOCIAL PHILOSOPHY.
FIRST PREMISE.	
Human nature reveals its own impotence, and hence the need of external control.	Human wants are dynamic, which tendency of itself creates improving forms of social control.
SOURCES OF DISCIPLINE.	
War.	Work.
REASON FOR SUBMISSION.	
Sovereign.	Prosperity.
MEASURE OF EFFECTIVENESS.	
Peace.	Income.
END TO BE SECURED.	
Liberty.	Progress.
DEFINITIONS.	
Natural justice causes the same individuals to be eliminated or subordinated and the same individuals to survive and prosper as would happen in a state of nature.	Social justice restricts both extremes of society, thereby increasing the prosperity of the socially intermediate.

This table is self-explanatory, but some sources of misunderstanding may remain. The older view of human nature emphasized its defects, and because of them a sovereign was demanded. The newer view starts not from human nature, which is investigated with difficulty, but from human wants which are easily measured. The older view emphasized war as the source of discipline and the means through which character is formed. Work gets this place in the newer scheme. Submission in the older scheme was due to the love or fear of rulers. To-day the only sovereign, is prosperity. If we accept a gold standard or a tariff, if we permit the continuation of monopolies or a money trust, or if we submit to the evils of a rising cost of living or of a bad distribution of wealth, we do it because it is demanded by prosperity, and not because of commands from superiors. We measure this prosperity in income just as our ancestors tested governmental efficiency by the peace it brought.

Social justice must be as definite and as objective as the primitive code it supersedes. It must draw from social life its general and abiding principles with the same care that judicial decisions have promulgated and interpreted the so-called natural law of earlier ages. To contrast the old and the new I shall again resort to the device of parallel columns.

NATURAL JUSTICE.	SOCIAL JUSTICE.
The doctrine of	The doctrine of
CONSERVATION.	POSSESSION.
STRUGGLE.	SOCIAL VALUES.
POSSESSION.	A LIVING WAGE.
EQUALITY.	EQUALIZED ADVANTAGE.
LABOR VALUES.	SUPERIOR ADVANTAGE.
PERSONAL RIGHTS.	PERSONAL EQUALITY.
FREE CONTRACTS.	A SOCIAL MODE.

The doctrine of possession is scarcely altered by being socialized. The great change comes from the contrast of labor values with social values. The older jurisprudence grew out of primitive conditions where labor was the chief origin of wealth, and hence the courts view all wealth as the result of individual toil and sacrifice. Present facts do not justify such a view. The primitive man thought he received his income through his contact with nature, and hence viewed his income as self-made, and not as society made. In the latter case, a budgetary relation exists between each man and society, the assets of which have a social origin.

If economic values are social, deductions from this fact should be made as to the advantages which personal contact with the environment create. Superior advantages are localized in ways that permit of their exploitation by a few. The right of the State to prevent an exploitation of the masses follows from this fact. Those who possess local advantages must yield control when public advantage demands a general use of local resources. A case of this kind is now awaiting decision by the American people. The State of Columbia controlled the region where the Panama Canal is building. What compensation is due Columbia? Under the doctrine of sovereignty Columbia has unlimited claims, which could, if recognized, block the building of the canal. Is there any difference between the right of a nation to a neck of land that prevents international commerce and its right to prevent the free passage of ships through a strait that

borders her shores? We refused to pay tribute to the Moors in Africa, and to Denmark for entrance to the Baltic. Shall we pay tribute for a similar right to cross the Isthmus of Panama?

The application of the doctrine of equalized advantage is of importance as it affects both external and internal trade relations. A protective tariff is an attempt to equalize environmental advantage. By it the local advantages of particular regions are taken from their possessors and distributed more widely among the workers of the world. If these local advantages have a social origin, this process has a justification. The same problem arises in internal trade in connection with transportation. The rates to the seaboard are fixed not on the basis of cost, but with the view of equalizing the trade of various cities. New York, which has the lowest cost, has the highest rate; and other parts have rates inversely to the cost of transportation. This is a case of equalizing advantage. It has a justification if the local advantages of each city and transportation route are not the result of the labor expended by the people interested in the various cities or routes, but are socially created. A good rule for foreign commerce would be: Give to all sections the same advantage and to each section some advantage over the outside world. The same rule in internal trade would be: Give to each section an equal advantage in production and transportation, and to each section some protection for its local advantages.

Society is at present abnormal in that wealth is aggregated at one extreme, and numbers at the other. Two opposing modes are thus created instead of a harmonious growth at the center. The control of society by the one extreme means reaction; by the other, revolution. This condition of unstable equilibrium has continued so long that it is regarded as natural. Recently, however, evolution has been playing a larger part, and the upbuilding of a true social mode is in progress. The rich are losing in wealth, and the poor in numbers. Progress consists in those changes that create advantages for those of moderate income who have the industrial qualities of the rich and the working power of the poor. This change is not primarily one of heredity, nor of industrial efficiency, but of a redistribution of the social surplus to which all have an equal claim. In the past the end of law was to protect property and liberty. In the future

the social mode should have the advantage that progress creates. If the courts recognize this fact, a ready means would be found for passing from the old to the new justice without revolution or despoilation.

We are often told that the province of judges is rigidly to interpret legal doctrines. If they prove inadequate, the legislator and not the court, should provide a remedy. Social legislation is, however, based on emotional demands, and cannot be secured except by an agitation promoting revolution even if it does not create it. The choice is between emotional justice with its evils, and the acceptance of social principles by the court. Slavery in Europe was abolished, not by a sudden revolution, but by increasing the restrictions that in the end made slavery unprofitable. In the same way we should secure a living wage. The evils of low standards could be removed if the courts took a liberal view of the law and economic facts involved. There is no prescribed division of powers between the legislative, judicial and executive functions which can be accepted. The natural evolution is for the executive and the judicial to encroach on the legislature. In this way emotional outbursts are prevented, and orderly evolution displaces the crude countermovements of revolution and reaction.

OUR LITIGIOUS SYSTEM. E. L. Henderson.

Our system of legal procedure is litigious. Judge and jury, whose function it is to see that justice is done, are for the most part passive spectators in the contest between the plaintiff and the defendant. The active investigation of the facts and the law is left to the opposing attorneys, who are not primarily *investigators* interested in getting truth and justice, but *advocates* possessed with a desire to win. This system has the advantage of being the product of natural growth. It is individualistic in spirit, leaving to the persons most concerned the responsibility for beginning action and for properly presenting their own cases. It has four main advantages: (1) It invokes the powerful motive of self-interest to inspire the zeal of the advocate in his work. The theory is that the most complete exposition of the facts which is available will come from the cases made out by the contesting parties. (2) Since each party in a litigation is responsible for its own case, it cannot complain at

the presentation of this, and is, therefore, compelled to be satisfied at least with everything but the decision. (3) The passive attitude of judge and jury is more favorable to impartiality than the more active one of the investigator. Partiality is especially in evidence where the officers of the law who are responsible for the detection of criminals set themselves to frame up cases against suspects. (4) The costs of litigation deter from unjustified, trivial or needless law-suits, and also tend to check wrongs which by bringing about litigation may lead to great expense.

On the other hand, the extreme individualism of the litigious system is a source of grave defects: (1) It matches the wits and the enterprise of the attorneys and so ultimately the resources of the contestants, rather than the facts for and against a case. Each party suppresses evidence against it and distorts testimony to suit its case. It fights. As in the mediæval trial by combat, with which it is directly akin, litigation makes the decision rest upon factors irrelevant to the issue of justice. (2) The expenses of litigation discourage those who are wronged from seeking redress, especially if their resources be slender. (3) The lawyer trained to the task of the advocate, is put in the attitude not of seeking justice, but rather of winning his case. Hence the legal profession develops no sense of responsibility for such laws and such procedure as will most efficiently secure justice.

In some instances of legal procedure the judicial authorities assume active responsibility for the investigation of the facts and law regarding the cases brought before them. Such methods may be denominated inquisitorial rather than litigious. The inquisitorial system could be employed far more than it is at present by extending the use of investigating commissions appointed by the courts. The development of a profession of legal inquirers might tend to diminish the need for advocates and to transform them into searchers for truth and justice. The method of inquisitorial commissions is the only one by which reliable and adequate expert testimony can be obtained.

THE SOCIAL SCIENCES AS THE BASIS OF LEGAL EDUCATION. William Draper Lewis.

Every society is composed of one or more groups. The concept on which these groups rests is sometimes racial, sometimes

territorial, and sometimes economic unity, but usually a mixture of all three. The group is real. The essence is the consciousness of unity among its members. The conceptions of groups and their relations prevalent among the members of any society are the social ideas of that society.

The study of the growth of social ideas is or ought to be an important branch of social science. It is that branch of social science which has a direct bearing on the study of law.

Our idea of the things which the law student should study will depend on our conception of the nature of law and the nature of the service which the community has a right to expect from the legal profession. Law is a form of expression of a social idea. The existing social ideas of a people are the product of the environmental history of its groups. These ideas are in the course of constant modification by the differences between past and present environment. When a law ceases to represent the social idea of a group, the members begin to regard it as unjust. It is vitally important that law should express dominant social ideas. Without a reasonable correlation between law and social ideas orderly progress is impossible. There is no such thing as abstract justice. That is just in any community which corresponds to the community's felt sense of right.

The community has a right to expect that the legal profession will administer law efficiently. Law is administered efficiently, only when being administered impartially and as rapidly as is consistent with reasonable care that the principles of law are so applied as to make the law correspond to changes in dominant social ideas.

To understand this statement, it is necessary to understand the difference between a legal rule and a legal principle. The difference, though perhaps one of degree rather than one of kind, is fundamental. A legal rule is always applicable to the facts to which it is intended to apply. Whether first expressed by legislative action or judicial decree, once fixed, a rule of law should not be altered by a judge. A judge may help to make a rule of law, not to unmake it.

A legal principle, while it always tends to apply, is never universally applicable. Two legal principles often apply to the same facts and are in opposition. A judge, in deciding many cases, not only has to know the legal principles applicable, but their relative importance. If he is worthy, when two principles

apply to the facts of a case and are conflicting, he places the emphasis where the dominant existing social ideas require that it should be placed.

If law is a form of expression of a social idea, and one of the necessary functions of courts is to mold the law to meet changes in social ideas as they occur, social science, and especially that branch of it which deals with group development and the growth of social ideas, is a necessary part of legal education. The fact that it is the judge who nominally alone performs this function does not lessen the force of this conclusion. The legal writer has always had an effect on the law; the judge is taken from the ranks of the legal profession, and the work of the judge cannot be adequately performed without the assistance of a well trained bar.

The importance of the social sciences as part of the training of the lawyer is greatly increased by existing conditions. In the last few years there has been growing among all classes a distrust in the justice of the law. This is due to the fact that we are passing through a period of comparatively rapid change in our fundamental social ideas. When social ideas are undergoing rapid change, then the lawyer and judge, necessarily grounded in principles expressive of past conditions, are apt to be out of touch with current social ideas unless their training tends to make them interested in social questions.

It is not likely that results of marked value will come from adding to present courses in law modern teaching in economics, sociology and history. Law students need courses showing the development of legal principles given by men capable of pointing out the relation between the principle and the social idea on which it rests. Such men do not now exist. They will have to be evolved from the necessity of the situation.

THE PROCESS OF JUDICIAL LEGISLATION. M. R. Cohen.

The process whereby the law becomes a fit instrument for the realization of justice or other social ends is seriously retarded by the prevailing theory that the proper function of the judge is always to find the law and never to make it. This theory, like that of the rigid division of the powers of the State, or of the faculties of the mind, is typical of eighteenth century rationalism with its over-sharp antithesis of determination and freedom, reason and will, judiciary and legislature. In actual

life legislatures are not as free nor courts as bound as the traditional view maintains.

The basis of the prevailing view is to be found in the morally or logically obligatory character of most legal rules. Judges and lawyers feel themselves obliged or bound by this rational order and find it difficult, therefore, to view themselves also as creators of it. The application, however, of the evolutionary standpoint to this as to other situations involving *a priori* elements, shows no real contradiction between the obligatory character of legal rules and the fact that judges and lawyers are largely responsible for their development.

The process of judicial legislation may be considered under three heads: direct legislation, interpretation, and application. (1) As life is constantly developing new situations and judges are compelled to decide every case before them according to some rule, it follows that they must develop new rules. Because of their natural conservatism, and to mitigate the shock of innovation, fictions are invented whereby the new rules are treated as ancient members of the legal body. The process of inventing new rules consists mainly in stretching old rules and modifying them to new situations (*e. g.*, the law of common carriers as applied to railroads, etc.). When the new wine can no longer be poured into the old bottles, new ones are created by the invention of conditions implied by law, presumptions which are often contrary to fact, and, in the case of great creative judges like Mansfield, Gibson, or Shaw, by the open announcement of new legal rules based on the prevailing ideas of justice, public policy, and general view of the nature and fitness of things. (2) The prevailing theory views the process of interpretation as a merely passive one in which judges merely open their eyes and read the preëxistent law. But no legislators, codifiers, or constitutional framers, can foresee all the possible situations that will arise in the future, and provide for every case or emergency. The necessarily abstract character of general laws requires supplementary legislation on the part of those who have to administer them, and the rules for their interpretation are, as a matter of fact, calculated not so much to help us find the actual intention of the legislature, as rather to help us give statutes a form and content which will adapt them to the complicated needs of life. (3) The application of laws has generally been viewed as a merely mechan-

ical process of subsuming the particular act or case under the proper rule or category. In practice, however, this involves a highly technical and fine art of weighing conflicting claims and principles and of finding compromises that will minimize social friction. The process involves, among other things, (*a*) an analysis and appreciation of the different factors in the living situation, and (*b*) a comprehensive perception of the relative importance and subordination of the different possible principles of the law. The former (*a*) involves a definite attitude to ethical and social problems based on some general philosophy of life, and the latter (*b*) a definite philosophy of the particular legal system, its functions and limitations.

THE SOCIAL ENDS IN THE PREAMBLE TO THE CONSTITUTION. G. A. Black.

The preamble of the federal constitution puts a remarkable enumeration of social ends in relation to the supreme law of the United States. In the supposed limiting case, United States of the World, the distinction between the end to provide for the common defense and the end to insure domestic tranquility vanishes; and the former is transformed into the latter. This conception of one social end as dropping out of discussion, because transformed into another as society enters a new state or condition, is differently applicable to the end of securing the blessings of liberty. For into the difference between reserved and granted power is transformed the identity of liberty in relation to law when a given society first chooses its own form of government, with reservation of power to amend it. After that, the term liberty tends to drop out of discussion, and public interest centers wherever the conflicting, but by no means irreconcilable, claims of reserved and granted power are conspicuously in evidence. At present these general considerations prescribe a closer consideration of cases in which some prohibition in the fourteenth amendment is set up as a defense against some new assertion of the police power. The Oklahoma bank case is singularly interesting, for in it, and then only in decisions of our highest court, the police power is defined in terms that set recognizable limits to the valid exercise of the power as a means to public welfare. Until such limits are definitively established, the relation of liberty to our law stands in jeopardy.